Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1998

PAUL ZOSKI,

Petitioner,

v.

ROBERT KEGLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals applied the proper standard of qualified immunity when it held that Livonia Police Officer Zoski who had been informed that Respondent had threatened a motorist with a gun was not entitled to qualified immunity for conducting a warrantless search of Respondent's garage because exigent circumstances did not exist?

PARTIES TO THE PROCEEDING

The Petitioner is City of Livonia Police Officer Paul Zoski. The Respondent is Robert Kegler, the plaintiff in this case.

The City of Livonia was a defendant in the District Court, but was granted summary judgment and the Respondent did not appeal.

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Petitioner, Paul Zoski, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix A at 1a. The Opinion of the District Court in *Robert E. Kegler v. City of Livonia and Paul Zoski*, 96-CV-74074 is contained in Appendix C at 15a. The Opinion of the District Court denying petitioner's motion for reconsideration is set forth in Appendix B at 4a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on February 23, 1999. The Court of Appeals denied a timely petition for rehearing on March 23, 1999 (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures to be free from unauthorized searches and seizures shall not be violated, and no Warrants shall issue, but upon

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, suggests, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises out of the search of the garage of Respondent Kegler after Petitioner Officer Paul Zoski of the City of Livonia Police Department had received information over the police radio that Respondent had threatened a motorist with a gun. The search occurred immediately after Respondent pulled into his garage.

On February 16, 1996, Petitioner Officer Zoski was on routine patrol in the area of Six Mile and Newburgh Road in Livonia when he heard a radio dispatch concerning a felonious assault. Officer Zoski was informed that a white male driving a vehicle with license plate number "GMC 197" pointed a

gun at one Troy York while he was driving eastbound on I-96. A LEIN check revealed Respondent's home address in Livonia. Officer Zoski proceeded to Respondent's address where he noticed that the vehicle fitting the description of the vehicle described in the dispatch was pulling into Respondent's driveway. The vehicle then entered the garage and the door was lowered. Before it was completely shut, Officer Zoski ordered Respondent to step out of the vehicle. Respondent was searched for weapons but none were found. Other officers arrived at the scene and searched the vehicle in the garage and no weapon or gun was found.

Upon several requests by the Petitioner, Respondent failed to produce his license and was arrested for "no operator's license on his person". During discussion between Officer Zoski and Respondent, the officer noted signs of intoxication. While being transported to the Police Station, Respondent performed field sobriety tests. Once at the station Respondent's driver's license was located and his status was reduced to "interfering with a police officer". Respondent unsatisfactorily performed additional sobriety tests at the station. He then refused to take the breathalyzer test and was arrested for "OUIL".

Petitioner Zoski requested a search warrant for a blood test which was reviewed by the City Prosecutor and approved by a Magistrate. Respondent was taken to St. Mary Hospital Emergency Room in Livonia for the blood test which revealed he was legally intoxicated.

This matter proceeded to a jury trial in the state's 16th District Court. The state judge dismissed the charges against Respondent ruling that the search of the Respondent's garage was illegal as the officers should have obtained a search warrant.

Respondent filed this lawsuit against the City of Livonia and Officer Zoski asserting a violation of his constitutional rights under 42 U.S.C. § 1983. Specifically, Respondent claimed that Defendants violated his Fourth Amendment right to be free from unreasonable searches and seizures by conducting a search of his property and seizing him without a warrant. Respondent also asserted a state claim of malicious prosecution.

Defendants filed a Motion for Summary Judgment. The District Court granted in part and denied in part Defendants' Motion. The court granted Defendants' Motion for Summary Judgment as to the § 1983 claim against the City of Livonia but denied it as to Petitioner Zoski. The court also granted summary judgment to Defendants on Plaintiff's state claim of malicious prosecution.

The District Court denied summary judgment to Petitioner Zoski based on qualified immunity because no exigent circumstances existed to justify a warrantless search of Respondent's garage. Petitioner Zoski filed a Motion for Reconsideration of the Order Denying Summary Judgment which was denied. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

On February 23, 1999, the Court of Appeals affirmed the District Court's denial of qualified immunity to Petitioner Zoski. Even though Petitioner Zoski had information that Kegler had pointed a gun at a motorist, thus committing the crime of felonious assault, the Court of Appeals concluded that a reasonable officer could not have believed "Kegler would attack violently at any moment" and therefore, the District Court did not err in its determination that Zoski was not entitled to qualified immunity. Petitioner's timely Petition for Rehearing was denied on March 23, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS APPLIED A MORE STRINGENT STANDARD THAN THE OBJECTIVE REASONABLENESS STANDARD OF QUALIFIED IMMUNITY REQUIRES.

Qualified immunity is appropriate either on the basis that the right allegedly violated was not at the time "clearly established", or if "clearly established," was one that a "reasonable" person in the defendant's position could have failed to appreciate would be violated by his conduct. *Pray v. City of Sandusky*, 49 F.3d 1154, 1157 (6th Cir. 1995). The standard is one of objective reasonableness, analyzing claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendant's position could have believed his conduct was lawful, in light of clearly established law and the information he possessed. *Id.* at 1158. Thus, officials are entitled to qualified immunity when their decision was reasonable, even if mistaken. *Id.* Qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

The relevant question in this case is whether an objectively reasonable officer would have believed that exigent circumstances existed to justify the warrantless search inside Respondent's garage in light of clearly established law and in light of the information possessed by the Petitioner.

The Court of Appeals in this case concluded:

> The objective legal reasonableness of an individual decision must be determined on a case-by-case basis. See *O'Brien*, 23 F.3d at 999. Here, the information on which Zoski acted was limited, to say the least. He had a report that could have lead to the conclusion that Kegler was armed, but this Court has consistently held that the existence of a gun in a suspect's home, without more, does not alleviate the requirements of the Fourth Amendment. See *O'Brien*, 23 F.3d at 996-98; *Morgan*, 743 F.2d at 1162-63; *United States v. Killebrew*, 560 F.2d 729, 733-34 (6th Cir. 1977). The "more" — i.e., facts that would lead a reasonable officer to believe that Kegler was likely to shoot someone during the time it would have taken to obtain a warrant — simply did not exist here. Zoski did not, for instance, have information that Kegler had fired a gun; he did not observe Kegler acting or driving erratically; he did not ascertain facts that could have led to a conclusion that someone was in Kegler's house, let alone that someone in the house was in danger; he did not have information that Kegler was suicidal; he did not have information that Kegler was mentally ill; he did not have information that Kegler had a history of violence; he was not involved in an extended stand-off with Kegler.

It is important to note that the cases relied upon by the Court of Appeals dealt only with the question of whether exigent circumstances existed and *not* whether the officer was entitled to qualified immunity, *i.e.*, whether it was objectively

reasonable for the officer to believe that exigent circumstances existed. For example, in *United States v. Gooch*, 6 F.3d 673 (9th Cir. 1993), the court affirmed the district court's judgment of acquittal and the subsequent dismissal of Gooch's conviction for being a felon in possession of a firearm because exigent circumstances did not exist to justify the warrantless entry and search of Gooch's tent. The court noted that even though it had been reported that firearms had been discharged several hours earlier and people were leaving the campgrounds in fear, exigent circumstances did not exist since there was no actual ongoing threat.

In *Singer v. Court of Common Pleas*, 879 F.2d 1203 (3rd Cir. 1989), the court held that no fact-finder could find exigent circumstances "*beyond a reasonable doubt*", where a suspect in domestic violence was arrested in his house without a warrant.

The case of *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984) concerned a motion to suppress a .45 caliber pistol seized in a warrantless entry and search of Morgan's home. The court affirmed the district court's order granting the motion to suppress because there were no exigent circumstances. The court found no immediate threat to the arresting officers or the public.

In *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992), the court found that the factual record aptly demonstrated that exigent circumstances existed where the officers were aware that plaintiff was suicidal, mentally ill, had fired shots, and had threatened to kill the police.

None of the above-cited cases addressed the issue of qualified immunity. Rather, all of the cases considered the question of whether exigent circumstances existed to justify the warrantless arrest or seizure. Thus, the panel incorrectly applied to the instant case the standard utilized by the court in deciding those cases.

The court in *O'Brien v. Grand Rapids*, 23 F.3d 990 (6th Cir. 1994) clarified the applicable qualified immunity standard in the context of exigent circumstances. The court held that the fact that in law, exigent circumstances did not exist is not dispositive, and that an officer would be entitled to qualified immunity if a reasonable officer could believe that exigent circumstances existed. The court in *O'Brien* stated:

> We think it is clear that the officers were not, in law, excused on exigent circumstance grounds from obtaining a warrant before invading O'Brien's house. But we cannot say that no reasonable officer, objectively assessing the situation, could conclude that there were exigent circumstances excusing the requirement that a warrant be obtained . . . The fact that, in law, exigent circumstances did not exist is not dispositive. The officers' . . . conclusion that they faced an exigent circumstance that excused a warrant before ordering the probe of O'Brien's residence was not so objectively unreasonable that they should be subjected to personal liability for their actions in carrying out their official duties.

Id.

The court in *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994) also stated:

> *Whether the officers violated the Fourth Amendment or whether exigent circumstances in fact justified the warrantless eviction, however, does not resolve the issue of qualified immunity.* In *Anderson v. Creighton*, [483 U.S. 635 (1987)] the Supreme Court cautioned that law enforcement officers whose judgments in making difficult determinations are objectively, legally reasonable should not be held personally liable in damages for conduct which under Fourth Amendment academics, constitutes a violation.

483 U.S. at 643-44.

The court stated:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and *we have indicated that in such cases those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.*

17 F.3d at 170 (emphasis added).

It is therefore clear that the standard of objective reasonableness is not stringent. Zoski will not be entitled to qualified immunity only if no reasonable officer could

conclude that exigent circumstances existed in light of the information he possessed. *O'Brien*, *supra*. In *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1991), the court held that the terms used by the Supreme Court in describing the standard in *Anderson v. Creighton*, *supra* show a measure of deference to the decision of police officers. The court in *Roy* stated:

> The [*Anderson*] court used as its standard the "reasonable officer" and what "could reasonably have been thought lawful" by such an officer, terms suggesting a measure of deference. The court then quoted earlier decisions saying that immunity protects "all but the plainly incompetent or those who knowingly violate the law" or those who act where "the law clearly proscribed the actions" taken. See also *Malley v. Briggs* [supra] (qualified immunity leaves "ample room for mistaken judgments"). What these precedents dictate is this: whether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on the spot choices in dangerous situations with a fairly wide zone of protection in close cases.

42 F.3d at 695.

Applying this differential standard to the facts of this case, Petitioner Zoski clearly could reasonably have believed that exigent circumstances existed to justify a warrantless entry or search. The Court of Appeals correctly states that the mere existence of a gun in a suspect's home without more does not constitute exigent circumstances. However, in this case there is *more* than a mere existence of a gun. In this

case, the evidence showed that Kegler had a few minutes earlier pointed a gun at a citizen. The victim of this alleged felonious assault had called 911 to report the incident. Any reasonable officer to which this information was relayed would have concluded that the suspect was a dangerous person who poses a threat to the officer and the public and that an immediate action needed to be taken to deal with the situation.

In *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), the Supreme Court held that the police officers acted reasonably when they entered the defendant's house to search for an armed robber and for the weapons he used in the robbery. The Court held:

> We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search of him without warrant was invalid. *Under the circumstances of this case, "the exigencies of the situation made that course imperative." McDonald v. United States*, 335 U.S. 451, 456; 69 S. Ct. 191, 193; 93 L. Ed. 153. *The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them.* The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of

> the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

Id. at 298-99. (Emphasis added).

The circumstances in this case parallel those presented in *Hayden*, *supra*. In this case, Officer Zoski received a call over the police radio that there existed a dangerous situation involving a man with a gun who had threatened a motorist with the gun. Given the information possessed by Petitioner Officer Zoski, upon his arrival at Respondent's home, it was reasonable for the officer to believe that an exigent situation existed presenting an immediate threat to him and other arresting officers, and persons inside the house. Like the officers in *Hayden*, Officer Zoski acted reasonably in entering the garage and searching for the weapon which Plaintiff had used in threatening the motorist or might use against the officer and others. Leaving an officer behind to confront an armed suspect while Petitioner went to obtain the warrant would have placed the officer in danger. Respondent's possession of a weapon which he has shown a willingness to use clearly created a potential for violence which necessitated quick action by the Petitioner.

Thus, even if exigent circumstances did not exist in fact, as determined by the District Court, Petitioner is entitled to qualified immunity because, applying the proper standard for granting qualified immunity, based on the law and the facts, at a minimum, Petitioner could reasonably have believed that sufficient exigent circumstances existed to justify a warrantless search of Respondent's garage and car.

The Sixth Circuit has held that the presence of a weapon creates exigent circumstances, provided the government is able to prove they possess information that this suspect was armed and likely to use a weapon or become violent. *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996). In this case, there is no doubt that Kegler by pointing a gun at a citizen has shown that he is likely to use the weapon or become violent. Contrary to the Court of Appeals' assertion, Officer Zoski did not act based on only the information that Kegler was armed. Zoski was informed that Kegler was not only armed but had threatened to use the weapon. Although the broadcast relaying the information to Zoski did not indicate the person who threatened the motorist with a gun is Kegler, there was no uncertainty as to his identity since his car and registration number matched the description provided by the complainant, and a computer check revealed that the car was registered to the house where he was located a few minutes later.

As established in *O'Brien*, *supra*, Officer Zoski need not comply with the strict conditions of the exigent circumstances exception to the warrant requirement to be entitled to qualified immunity. An officer should not be held to the standard of a constitutional law scholar concerning the vagaries of the exigent circumstances exception to obtaining a warrant. *O'Brien*, *supra*. Defendant Zoski is entitled to qualified immunity because his decision to conduct the warrantless search under the circumstances was reasonable, even if mistaken. To hold that Officer Zoski is not entitled to qualified immunity will undermine the purpose of the qualified immunity defense, which is, to allow police officers to vigorously carry out their law enforcement duties and "not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991).

The Court of Appeals' analysis fails to make the proper distinction between qualified immunity and the merits of the alleged constitutional violation. The qualified immunity defense implies the existence of a constitutional tort and the officer is shielded from liability for the tort when he would otherwise be liable. Thus, the Court of Appeals' conclusion that exigent circumstances did not exist and therefore Petitioner was not entitled to qualified immunity is clearly at odds with the purpose of the immunity defense. *See* David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 Cal. W. L. Rev 201 (1994) ("the issue before the court . . . should become qualified immunity, not the merits of the alleged constitutional violation.")

Petitioner Officer Zoski is entitled to qualified immunity because he acted reasonably in conducting immediate warrantless search based on the information he possessed that Plaintiff was armed *and* had threatened a citizen with a gun. The focus should be on the objective reasonableness of Petitioner's action not on whether the legal requirements of exigent circumstances had been met. Petitioner's reasonable, but mistaken belief that exigent circumstances existed would not subject him to liability. *Malley*, *supra*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED FEBRUARY 23, 1999

No. 97-2206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT KEGLER,

Plaintiff-Appellee,

v.

CITY OF LIVONIA, et al,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: JONES and COLE, Circuit Judges; DLOTT, District Judge.*

R. GUY COLE, JR., Circuit Judge. Defendant, police officer Paul R. Zoski, appeals the district court's denial of qualified immunity in plaintiff Robert Kegler's 42 U.S.C.

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* The Honorable Susan J. Dlott, District Judge for the Southern District of Ohio, sitting by designation.

§ 1983 action, which stemmed from Zoski's warrantless search of Kegler's garage. For the following reasons, we **AFFIRM** the judgment of the district court.

I.

The facts of this case are not in dispute. On February 16, 1996, the Livonia, Michigan, police dispatcher radioed the department's officers with a report that a white male in a white Dodge Stealth, license number GMC 197, had pointed a handgun at the driver of another car on I-96 in the nearby suburb of Redford, Michigan. The broadcast did not indicate that the person who allegedly committed this deed was Kegler. A computer check, however, revealed that a Stealth matching the announced description was registered to the plaintiff, a resident of Livonia. Upon hearing this news, Zoski, whose patrol car was already in the vicinity of Kegler's subdivision, drove to Kegler's address to investigate matters. Zoski passed by Kegler's house once and saw nothing of note. As he was turning around, however, he observed Kegler's white Stealth turning onto the street. Zoski did not turn on his flasher or siren or make any other effort to stop the car. Instead, after the Stealth pulled into Kegler's garage, Zoski pulled into Kegler's driveway. Zoski then exited his vehicle, tripped a light sensor on the garage door track to prevent the door from coming down, and, with gun drawn, entered the garage. He did not have a warrant to search Kegler's home.

As Kegler exited the vehicle, Zoski ordered him to put his hands on his head. Zoski searched Kegler for a weapon, finding nothing. He then placed Kegler in the patrol car. Other officers arrived on the scene and searched both the Stealth and the garage for a gun. They also found nothing.

Appendix A

Kegler was not charged with the alleged I-96 assault. He was charged with other crimes, however. After the search for the gun turned up empty, Zoski asked Kegler for his driver's license and, when Kegler refused the request, arrested him for "no operator's license on person." Police reduced this charge to "interfering with a police officer" after Zoski located Kegler's license on his person while booking him. Police also charged Kegler, who exhibited signs of drunkenness during and after his arrest, with "driving under the influence of liquor." A blood test — obtained in accordance with a warrant police obtained after Kegler refused a breathalyzer — revealed that Kegler's blood-alcohol content was over the legal limit. A Michigan district court judge dismissed all charges against Kegler, however, ruling that Zoski's warrantless entry and search of Kegler and his property were illegal and that all evidence against him was the fruit of the illegal search.

In August 1996, Kegler filed this action against Zoski and the city of Livonia in the Wayne County Circuit Court. Kegler alleged, among other things, that Zoski's warrantless entry and search violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution. The defendants removed the action to the United States District Court for the Eastern District of Michigan. In September 1997, upon defendants' motion, the district court granted summary judgment in favor of the city of Livonia but denied it in favor of Zoski, who had asserted qualified immunity. Kegler does not appeal that decision with regards to Livonia. Zoski, however, filed a timely appeal.[1]

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1. A February 3, 1998 motions panel held that this court has jurisdiction over Zoski's interlocutory appeal. "[S]ummary judgment

(Cont'd)

Appendix A

II.

Whether qualified immunity applies is a question of law for the district court. On appeal, this court applies de novo review. *See Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 564, 573 (6th Cir. 1997); *O'Brien v. Grand Rapids*, 23 F.3d 990, 998 (6th Cir. 1994), *Hall v. Shipley*, 932 F.2d 1147, 1150 (6th Cir. 1991).[2] Qualified

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(Cont'd)
determinations are appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity, typically whether the federal right allegedly infringed was clearly established." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (internal quotations omitted).

2. Kegler contends that this court should not reach this issue, but instead hold that Zoski is collaterally estopped from arguing qualified immunity based on the Michigan criminal court's finding that the search was illegal. This position, which the district court apparently accepted, is without merit. State law controls issues of collateral estoppel. *See Miagra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984). In Michigan, collateral estoppel applies only if the issues in the two actions are identical and the litigants in the second action are the same as or in privity with the litigants in the first case. *See Lumley v. Board of Regents*, 544 NW.2d 692, 696 (Mich. 1996); *Amalgamated Transit Union v. Southeastern Michigan Transportation Authority*, 473 N.W.2d 249 (Mich. 1991). As an initial matter, at issue in the criminal trial was whether exigent circumstances existed, whereas at issue here is whether it was reasonable for Zoski to believe that exigent circumstances existed. Furthermore, Zoski was neither a party, nor in privity with a party, in the criminal case. *See Kraushaar v. Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995), *Wallace v. Mamula*, No. 93-3603, 1994 WL 389197, *2-*4 (6th Cir. July 26, 1994).

immunity is an affirmative defense potentially available to public officials acting within the scope of their discretionary authority. *See Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589 (6th Cir. 1994). Its purpose is to allow public officials to make judgment calls in legally uncertain environments by protecting them from undue interference with their duties and from potentially disabling threats of liability. *See Ryder v. United States*, 515 U.S. 177, 185 (1995); *Elder v. Holloway*, 510 U.S. 510, 514 (1994). It follows, then, that the defense is not available when an official violates well-defined and widely recognized rights. *See Anderson v. Creighton*, 483 U.S. 635, 646 (1987). In other words, the relevant question in qualified immunity analysis is the "objective legal reasonableness" of the official's action in light of current law. *Id.* at 639.

To determine whether the defense applies in a particular case in which the plaintiff alleges a public official committed a constitutional violation, we first ask whether such a violation occurred, based on applicable law. If this is so, we then consider whether the violation involved a clearly established constitutional right of which a reasonable person should have known. *See Daughenbaugh v. Tiffin*, 150 F.3d 594, 602-03 (6th Cir. 1998); *Chappel*, 131 F.3d at 573; *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996). We make this latter inquiry in light of the information that the defendant official possessed at the time of the incident in question, *see Russo v. Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992), and cognizant of the fact that public officials generally are not hermetic, ivory-tower scribes versed in the vagaries of constitutional law. *See O'Brien*, 23 F.3d at 1000.

Kegler contends that Zoski violated his right to be free from unreasonable searches and seizures. The right in question in this case is thus "not a novel idea." *United States v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984). The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures to be free from unauthorized searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.Const. amend. IV. The Framers drew "a firm line at the entrance to the house."[3] *Payton v. New York*, 445 U.S. 573, 590 (1980). It is a "basic principal of Fourth Amendment law that searches and seizures inside the home without a warrant are presumptively unreasonable." *Id.* at 586; *see also Johnson v. United States*, 333 U.S. 10, 14 (1948) ("[W]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent"); *Pray v. City*

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3. "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!" *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting remarks, made in 1763 and attributed to William Pitt, regarding searches incident to the enforcement of an excise on cider).

of Sandusky, 49 F.3d 1154, 1157 (6th Cir. 1995) ("[I]t is well established that a warrantless search is unreasonable absent probable cause and exigent circumstances."); *United States v. Bowling*, 900 F.2d 926, 933 (6th Cir. 1990) (*citing Johnson*). A reasonable official is aware of the Fourth Amendment. *See Pray*, 49 F.3d at 1158.

There are several well-established exceptions to the warrant requirement, however. Among them, the exigent circumstances exception. This court has stated that it is not possible to create a "succinct yet exhaustive" list of circumstances that qualify as exigent, but has identified general situations during which a warrant is not needed for entry into a home: 1) during hot pursuit of a fleeing felon; 2) where there is the danger of imminent destruction of evidence; 3) where there is the need to prevent a suspect's escape; 4) where there is a risk of danger to the police or others. *Id.* at 1515. This court has also stated that a situation is not an exigent circumstance unless "real, immediate and serious consequences . . . *would certainly occur* were a police officer to postpone action to get a warrant." *O'Brien*, 23 F.3d at 997 (emphasis added) (internal quotations omitted); *see also Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984).

Zoski asserts that he is entitled to qualified immunity because a reasonable officer in his position could have concluded that exigent circumstances existed justifying his intrusion into Kegler's garage. *See O'Brien*, 23 F.3d at 998-1000. Specifically, he argues that he possessed information — the dispatcher's broadcast that someone had reported to police that a person in a vehicle with a description matching Kegler's wielded a weapon — that would have led a

reasonable officer in his situation to believe that Kegler posed a real and immediate threat to the public and to Zoski himself.[4] We disagree.

The objective legal reasonableness of an individual decision must be determined on a case-by-case basis. *See O'Brien*, 23 F.3d at 999. Here, the information on which Zoski acted was limited, to say the least. He had a report that could have led to the conclusion that Kegler was armed, but this court has consistently held that the existence of a gun in a suspect's home, without more, does not alleviate the requirements of the Fourth Amendment. *See O'Brien*, 23 F.3d at 997-98; *Morgan*, 743 F.2d at 1162-63; *United States v. Killebrew*, 560 F.2d 729, 733-34 (6th Cir. 1977). The "more" — i.e., facts that would lead a reasonable officer to believe that Kegler was likely to shoot someone during the time it would have taken to obtain a warrant — simply did not exist here. Zoski did not, for instance, have information that Kegler had fired a gun; he did not observe Kegler acting or driving erratically; he did not ascertain facts that could have led to a conclusion that someone was in Kegler's house, let alone that someone in the house was in danger; he did not have information that Kegler was suicidal; he did not have

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4. One of the cases Zoski cites in support of this proposition that a reasonable officer would have believed a danger to the public existed is *Warden v. Hayden*, 387 U.S. 294 (1967). "The 'hot pursuit' justification for warrantless entry into a house derives primarily from the Supreme Court case[] of *Warden*." *United States v. Rohrig*, 98 F.3d 1506, 1515 (6th Cir. 1996). In nether his brief nor his oral argument, however, did Zoski develop a hot pursuit argument. This is just as well because we conclude that on the facts of this case, there was no hot pursuit.

information that Kegler was mentally ill; he did not have information that Kegler bad a history of violence; he was not involved in an extended stand-off with Kegler. *See, e.g., United States v. Roark*, 36 F.3d 14, 17 (6th Cir. 1994) ("unsubstantiated suspicions" insufficient to support finding of exigent circumstances); *United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1993) (warrantless arrest of suspect not justified by danger to officer and others where scene appeared quiet, although police had numerous reports that several hours earlier suspect had fired shots and attempted to stick a man's head into a campfire during a fight); *Singer v. Court of Common Pleas*, 879 F.2d 1203, 1206-07 (3rd Cir. 1989) (danger to police or others did not justify warrantless arrest of suspect accused of domestic violence in home, although police knew suspect possessed guns — no rational person would believe "that a lethal attack might come from a house at any moment"); *Morgan*, 743 F.2d at 1162 (warrentless entry not justified by immediate threat where suspect peacefully inside home, although officers had information that suspect was in possession of several guns, had fired guns earlier, and had threatened to "kill any law that tries to arrest them"). *Compare United States v. Johnson*, 22 F.3d 674 (6th Cir. 1994) (danger to others justified warrantless entry into plaintiff's apartment where, before entering, officers possessed information that plaintiff was holding young girl against her will and sexually assaulting her); *United States v. Johnson*, 9 F.3d 506 (6th Cir. 1993) (similar result where officers witnessed on-going burglary); *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992) (similar result where officers aware that plaintiff was suicidal, mentally ill, had fired shots, and had threatened to kill police); *Russo*, 953 F.2d at 1060 (similar result where officers aware that plaintiff was mentally ill, suicidal, and in possession of two large knives).

Appendix A

O'Brien, which Zoski correctly cites for the proposition that an officer can be immune in a § 1983 action if his actions violated the law but were objectively reasonable, is distinguishable on its facts. In *O'Brien*, Grand Rapids police were on hand outside the plaintiff's home to assist a court officer in his attempt to seize a truck to satisfy an outstanding judgment against a reputed "reclusive and . . . strange" man. 23 F.3d at 993. As a tow truck attempted to hook up the vehicle, O'Brien suddenly appeared at his door with a rifle and warned the officers to leave his truck alone. He then retreated into his house, and a lengthy standoff ensued. The court held that the warrantless search in question — which involved a mirror probe stuck through a window officers broke with a sledge hammer six hours into the ordeal — was not justified by exigent circumstances, but that a reasonable officer in the situation could have concluded otherwise. The court found it relevant that:

> [The officers] had on their hands a barricaded gunman who had previously shot and wounded a citizen in the front yard of the same premises. They had been told that O'Brien had assaulted Officer Johnson with a rifle. They knew he was armed, dangerous, and unpredictable. He had a history of violence and mental problems. The immediate neighborhood had been evacuated, the house was surrounded, darkness was approaching, and there was concern about whether the neighbors should be permitted to return to their homes. The situation was tense and dramatic, and it was not unreasonable to conclude that there was a possibility of sudden and violent action at the scene at any moment.

Id. at 998. The situation Zoski faced was not nearly as "tense and dramatic." He was not involved in a standoff with Kegler. He knew nothing about Kegler, other than the fact that "some citizen" had reported that a person in a car matching Kegler's had flashed a gun. Although we are mindful of the danger police face confronting potentially armed suspects, *cf. Knowles V. Iowa*, __ U.S. __, 119 S.Ct. 484, 488 (1998) (noting danger officers face even in a routine traffic stop), Zoski simply lacked the compass of information, possessed by the officers in *O'Brien*, which could have led a reasonable officer to conclude that Kegler was likely to attack violently at any moment. Therefore, the case is of no help to Zoski, and we must conclude that the district court did not err in its determination that Zoski was not entitled to qualified immunity.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED AND FILED OCTOBER 28, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KEGLER,

Plaintiff,

vs

CITY OF LIVONIA and PAUL ZOSKI,

Defendants

Case No. 96-CV-74074
Honorable Robert E. DeMascio

ORDER

Defendant, officer Paul Zoski, has filed this motion for reconsideration of our order denying his motion for summary judgment based on a qualified immunity. Defendant has failed to "demonstrate a palpable defect by which the Court and the parties have been mislead . . . [or] that a different disposition of the case must result from a correction thereof." Local Rule 7.1(h)(3).

The court is not to look at a police officer's subjective good faith belief, but the objective legal reasonableness of

his actions. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir. 1994). Defendant Zoski would be protected by a qualified immunity if it were objectively reasonable for defendant to conclude, given the information he had, that immediate action was necessary. That is, did exigent circumstances exist? We already necessary. That is, did exigent circumstances exist? We already determined that no exigent circumstances existed for defendant's initial encounter with plaintiff.

Defendant asserts that his information was that defendant was in possession of a gun and that is enough to create an exigent circumstance. Defendant improperly interprets the case law that he relies upon. A weapon creates an exigent circumstances if "the government is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent." *Dickerson v. McClelland*, 101 F.3d 1151, 1160 (6th Cir. 1996); *U.S. v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996). Defendant has provided no evidence that he was aware that plaintiff was likely to use the alleged weapon he was carrying or become violent.

Defendant also asserts that it was objectively reasonable for him to confront plaintiff without a warrant because if he did not, his life would be placed at a greater risk of danger. From the evidence that was supplied, there is a factual question as to whether a reasonable officer would believe that plaintiff was a serious risk to the police or to a third-party.

Defendant has failed to demonstrate a palpable defect or that the disposition of the case would change if any such defect occurred. There is a factual question whether defendant

Appendix B

Zoski acted as a reasonable police officer under the circumstances;

NOW, THEREFORE, IT IS ORDERED that defendant's motion for reconsideration is **DENIED.**

s/ Robert E. DeMascio
Robert E. DeMascio
United States District judge

Date: OCT 28 1997

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 18, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 96-CV-74074
Honorable Robert E. DeMascio

ROBERT KEGLER,

Plaintiff,

vs

CITY OF LIVONIA and PAUL ZOSKI,

Defendants

ORDER

This matter is before the court on defendants City of Livonia and Officer Zoski's motions for summary judgment. Plaintiff, Robert Kegler, alleges violations of 42 U.S.C. §1983, the Michigan Constitution, malicious prosecution, and punitive damages, arising out of his arrest on February 16, 1996. Livonia police dispatch was informed by the Redford Police Department that a white male driving a vehicle with license plate number "GMC 197" pointed a gun at one Troy York while he was driving east bound on I-96. Livonia police ran the license plate and determined that the vehicle was

registered to plaintiff's home address in Livonia. Defendant, Zoski, proceeded to plaintiff's address where he noticed a vehicle fitting the description of the vehicle described in the dispatch pulling into plaintiff's drive way. At this point, defendant made no effort to stop plaintiff's vehicle prior to it entering the garage. Defendant entered upon plaintiff's property, approached plaintiff's garage, where the vehicle was parked, and prevented the garage door from closing. Then, at gun point, defendant ordered plaintiff to step out of the car. Plaintiff was searched for a weapon, but none was found. Other officers arrived at the scene and they searched the garage, and the inside and underneath of the vehicle, and still no gun was found.

Next, defendant thought plaintiff indicated signs of intoxication and asked plaintiff if he had been drinking. Upon requests by defendant, plaintiff failed to produce his license and he was arrested for "no operators license on person." While transporting plaintiff to the police station, plaintiff preformed field sobriety tests. Once at the station plaintiff's drivers license was located and his charges were reduced to "interfering with a police officer." At the police station, plaintiff was required to perform additional sobriety tests. Plaintiff then refused to take a breathalyzer test, and was arrested for Operating Under the Influence of Liquor. Defendant Zoski requested a search warrant for a blood test, which was reviewed by the city prosecutor and approved by a magistrate. Plaintiff was taken to a local hospital for the blood test which revealed he was legally intoxicated. In district court, the judge dismissed the charges against plaintiff, ruling that the search on plaintiff's property was illegal as the officers should have obtained a search warrant.

Appendix C

Following dismissal of the charges, plaintiff filed this complaint.

To state a claim under 42 U.S.C. §1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1244 (6th Cir. 1989). It is not contested that defendants do not dispute the fact that officer Zoski was acting under the color of law at all times. Plaintiff then has the burden of proving that defendant's acts clearly violated an established constitutional right. To survive a motion for summary judgment asserting a qualified immunity defense, plaintiff must establish (1) that the allegations in his complaint make out a violation of clearly established law, and (2) that the evidence produced by plaintiff is sufficient to create a genuine issue of fact as to whether the defendant committed the acts that violated the law. Both are (questions of law for the court to decide. *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994).

Initially, plaintiff contends that he has a clearly established right to be free from unreasonable searches and seizures, and that defendant violated this right by entering upon his property and arresting him without a warrant. Defendant Zoski contends that he entered plaintiff's property without a warrant to protect himself and others, since he had the information that plaintiff was in possession of a gun and that this exigent circumstance provides an exception. *U.S. v. Johnson*, 22 F.3d 674, 679 (6th Cir. 1994). (However, if plaintiff's version of the facts proves to be true, there were no exigent circumstances to justify defendant's search of

plaintiff and his car without a warrant. Defendant noticed plaintiff enter the driveway of the home that was registered to the vehicle he was driving. With an officer remaining behind, defendant could have gone before a magistrate to seek a search warrant for plaintiff's garage, vehicle, and home. Had he done so he would have been advised that a further search was not justified. Nor do the facts support a reasonable belief that plaintiff was about to place a third-party in risk of harm.

Defendant also contends that it was necessary for him to prevent the destruction of the evidence and that this was an additional exigent circumstance. "A warrantless entry to prevent the loss or destruction of evidence is justified, if the government demonstrates: (1) a reasonable belief that third parties are inside the dwelling, and (2) [that] . . . the loss or destruction of evidence is imminent." *United States v. Radka*, 904 F.3d 357, 362 (6th Cir. 1990). It is unlikely that plaintiff could have disposed of a gun while defendant appeared before a magistrate with another officer surveillancing plaintiff's house to be sure he did not leave. A gun can not easily be disposed of or destroyed in a short period of time.

Defendant Zoski further contends that his conduct amounts to a Terry stop and therefore he only needed a reasonable suspicion that plaintiff is or was about to be involved in criminal activity. *U.S. v. Cortez*, 449 U.S. 411, 417 (1981). We disagree. When defendant Zoski encountered plaintiff he was pulling his vehicle into his garage. There was no stop involved. Nothing defendant saw would lead to a reasonable suspicion of ongoing criminal activity. Based upon these facts there is no evidence to support defendant's

motion for summary judgment based upon a Terry stop. Plaintiff has satisfied both prongs of the test to survive a summary judgment based on a qualified immunity. *Adams*, 31 F.3d at 386. Defendant Zoski's motion for summary judgment or in the alternative directed verdict is therefore denied.[1]

Moreover, "in enacting §1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978) . "That is[,] a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Board of County Comm'rs of Bryan County v. Brown*, 117 S.Ct. 1382, 1388 (1997). Plaintiff claims that the city has failed to create a policy regarding search and seizure; that it has granted total discretion to its officers; and that there is a long standing and widespread practice of its police officers making warrantless searches and arrests when no exigent circumstance exist. *Rushing v. Wayne County*, 436 Mich. 247 (1990). To rebut

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1. Defendant additionally raises a claim that plaintiff can not use offensive collateral estoppel against police officers. Defendant wants to relitigate the issue of exigent circumstances and the validity of his warrantless search. Federal courts give the same preclusive effect to state court judgments that those judgments would be given in courts of the state from which the judgment emerged. *Migra v. Warren City School District*, 465 U.S. 75 (1984). As the issue of exigency was actually litigated, the parties are bound by the state court decision in federal court.

this allegation defendant states that there is an unwritten policy to abide by state law; that plaintiff has not plead nor produced evidence to demonstrate that the city has been deliberately indifferent or is a moving force behind plaintiff's alleged deprivation of a federal right. Plaintiff has failed to plead facts sufficient to support his allegation that there is a custom or policy of depriving individuals of their federally protected rights. Accordingly, the claim against the city will be dismissed.

Defendant city of Livonia further contends that it is entitled to governmental immunity for state constitutional torts. The court in *Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir.), cert. denied, 498 U.S. 851 (1990), determined that *Smith v. Dept. of Public Health*, 428 Mich. 540 (1987), held that a cause of action under the Michigan Constitution is limited to those cases "in which the state's liability would, but for the Eleventh Amendment, render it liable under 42 U.S.C. § 1983 standard for local governments articulated in *Monell* . . ." A governmental agency, which includes municipalities, is entitled to governmental immunity from tort liability when it is engaged in the exercise or discharge of a governmental function. M.C.L.A. § 691.1407(1) (West 1996). Plaintiff alleges that the city of Livonia has a developed custom and policy of allowing warrantless searches and seizures; but as determined above, plaintiff has provided insufficient evidence to support such an accusation.

Additionally, defendant Zoski also contends that he is entitled to summary judgment on plaintiff's claim of malicious prosecution. In order to sustain a malicious prosecution claim, plaintiff must prove:

Appendix C

> "1. Prior proceedings terminated in favor of the present plaintiff;
> 2. Absence of probable cause for those proceedings;
> 3. Malice, defined as purpose other than that of securing the proper adjudication of the claim; and
> 4. A special injury that flows directly from the prior proceedings."

Payton v. Detroit, 211 Mich. App. 375, 395 (1995); citing *Young v. Motor City Apartments, Ltd.*, 133 Mich. App. 671 (1984). While it is not disputed that a prior proceeding was terminated in his favor, plaintiff has not provided evidence to establish the elements of a malicious prosecution claim.

Although it has been determined that defendant Zoski lacked probable cause to detain and search plaintiff, the Michigan Supreme Court applies a different probable cause standard in malicious prosecution cases. The court relies upon the subjective belief of the arresting officer. "Since probable cause is a matter of appearances presented to the defendant, a mistake of fact as to the conduct of the accused will of course not prevent its existence." *Koski v. Vohs*, 426 Mich. 422, 434 (1986); citing PROSSER & KEETON, TORTS §119 (5th ed.) p. 877. Additionally, the simple fact that plaintiff was acquitted of all charges does not mean there was no probable cause. *Stefanic v. Montgomery Ward & Co.*, 358 Mich 460 (1960).

Defendant committed his initial search and seizure without probable cause, however, once plaintiff was detained defendant requested plaintiff drivers license and plaintiff

refused to comply. Plaintiff was first arrested for not producing a drivers license and then for OUIL. Plaintiff contends that there was not probable cause for proceedings to be brought against him. However, based upon this Michigan case law, defendant Zoski did have probable cause to arrest him for failing to produce his drivers license. Moreover, defendant did not bring the charges against plaintiff, he only arrested him. Plaintiff does not contend that defendant did not make a full and fair disclosure to the city prosecutor who actually brought the charges. *Wilson v. Yono*, 65 Mich. App. 441 (1976). Plaintiff's claim for malicious prosecution will be dismissed.

THEREFORE, IT IS NOW ORDERED THAT, defendant City of Livonia's motion to dismiss plaintiff's 42 U.S.C. §1983 claim is **GRANTED;** Defendant Zoski's motion to dismiss plaintiff's 42 U.S.C. §1983 claim is **DENIED.**

IT IS FURTHER ORDERED that defendants' motion to dismiss plaintiff's state law claims is **GRANTED.**

s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Date: SEP 18 1997

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 23, 1999

Case No: 97-2206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ROBERT KEGLER

Plaintiff - Appellee

v.

CITY OF LIVONIA; PAUL ZOSKI

Defendants - Appellants

BEFORE: JONES and COLE; Circuit Judges; and DLOTT, District Judge*.

Upon consideration of the petition for rehearing filed by the appellant, it is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

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* Honorable Susan J. Dlott, United States District Court Judge for the Southern District of Ohio, sitting by designation.

Appendix D

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk